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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District

BRIEF FOR PETITIONER

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

QUESTION PRESENTED

Whether the respondent consignee had any fourth amendment interest in a package containing contraband which had been seized and examined during a lawful customs inspection, thereafter delivered to respondent at his apartment by law enforcement officials under controlled conditions, and then retaken by them from respondent after he moved the package from inside his apartment into the hallway of his apartment building.

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In The

Supreme Court of the United States

October Term, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1st Dist. 1981), and is reproduced in the Appendix to the petition for *certiorari* at 1a. The ruling of the trial court on respondent's motion to suppress evidence is not reported, and is reproduced in the Appendix to the petition for *certiorari* at 1b. The order of the Illinois Supreme Court of February 2, 1982, denying petitioner's petition for leave to appeal is reported at 88 Ill. 2d 20 (1982), and appears in the petition for *certiorari* at 1c.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 15, 1981. A timely petition for leave to appeal was denied by the Illinois Supreme Court on February 2, 1982. 88 Ill. 2d 20 (1982). That order appears in the Appendix to the petition for *certiorari* at 1c. The petition for a writ of *certiorari* was filed on April 3, 1982, and was granted on October 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Customs Examination and Controlled Delivery

On the morning of February 21, 1979, Ronald Drozek, a United States Customs Inspector, was assigned to the Lufthansa cargo facility at O'Hare Airport, Chicago, Illinois. (Tr. 41) Pursuant to his duties as a customs official, Inspector Drozek reviewed documents pertaining to a package which had been shipped from Calcutta, India, and was consigned to respondent at 61 East Goethe Street, Chicago, Illinois. (Tr. 41-42) After reviewing the documents, he decided to examine the contents of the 4 feet long, 4 feet wide, 1½ feet thick sheet metal package. (Tr. 26, 35, 42)

Inspector Drozek opened the package with keys attached to the airline documents and found a table top approximately 3 feet in diameter and 8 to 10 inches thick. (Tr. 4, 26, 43) After drilling into the table, he discovered a substance which field tested positive for marijuana. (Tr. 4-5, 43) He then contacted Drug Enforce-

ment Administration (DEA) agents who confirmed that the substance being smuggled into the United States in the package was marijuana. (Tr. 25-26) Inspector Drozek and the DEA agents then arranged for a controlled delivery to respondent of the package containing the contraband. (Tr. 13-14)

The following day, February 22, 1979, DEA Agent Kenneth Labek and Chicago Police Officer Wayne Lipsek received the resealed package containing the contraband from customs officials and transported it to respondent's apartment building at 61 East Goethe Street. (Tr. 13-16, 25-26) Posing as delivery men, they entered the building and advised building security personnel that they had a package for respondent. (Tr. 29) Within minutes respondent appeared and identified himself as John Andreas, the consignee of the package. (Tr. 29, 41-42)

Agent Labek, Officer Lipsek, and respondent then walked outside and removed the package from a delivery van. (Tr. 30) Officer Lipsek stated that the package was very heavy. (Tr. 30) Respondent replied, "that it wasn't very heavy, that he had packaged it himself, that it only contained a table." (Tr. 30) Agent Labek and Officer Lipsek then carried the package to the second floor hallway and, at respondent's request, left it outside his apartment door. (Tr. 30-31)

Officer Lipsek then left to obtain a State search warrant while Agent Labek remained in the building to maintain surveillance. (Tr. 31) Agent Labek then observed respondent pull the package into his apartment. (Tr. 31) Shortly thereafter, Agent Labek saw respondent leave his apartment and walk to a window at the end of the hallway. (Tr. 31) Respondent looked downward at the street and then reentered his apartment. (Tr. 31) Approximately thirty to forty-five minutes later,

Agent Labek, who had maintained surveillance within respondent's building, observed respondent in the hallway with the package. (Tr. 31-32, 37-38) He placed respondent under arrest and reasserted control over the package. (Tr. 17, 32) Officer Lipsek was called on the radio and was told to disregard the warrant because respondent had already been arrested. (Tr. 38)

Agent Labek then transported the package, which had been previously searched and then delivered to respondent, to Chicago Police Headquarters at 1121 South State Street where the package was reopened and the table removed. (Tr. 18, 35-37, 39) The table was then reopened and the marijuana which had been previously uncovered by Customs Inspector Drozek was recovered and inventoried. (Tr. 37, 68) The marijuana had a street value of $100,000.00. (Tr. 68)

Rulings on Motion to Suppress

Prior to trial, respondent moved to suppress the marijuana. He alleged that the reopening of the package violated his rights under the fourth amendment to the United States Constitution. (Tr. 91-92) Petitioner asserted that because the package in which the contraband had been secreted was lawfully searched during a proper customs inspection and was thereafter delivered to respondent under controlled conditions, the respondent had no legitimate expectation of privacy in the package or its contents and consequently the reopening of the package was absolutely lawful. The trial court, believing that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), necessitated the obtaining of a search warrant for the reopening of a package following a lawful search and controlled delivery, suppressed the evidence. (Tr. 61-62)

On appeal to the Appellate Court of Illinois, petitioner again asserted that after the smuggled contraband had been discovered during a lawful customs inspection, respondent had no reasonable expectation of privacy in the package. In support of that argument, petitioner noted that the decisions in *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980), and *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980), had held that the subsequent reopening of the package was merely a reassertion of control over the package because it had previously been the subject of a lawful search and a controlled delivery. The Illinois Appellate Court, rejecting the reasoning and holdings of the Seventh and Tenth Circuit Courts of Appeal, held that because the contraband had not been seized at the customs check point, respondent's fourth amendment rights were violated when the package was reopened after the controlled delivery.

Petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court. Petitioner now appeals to this Court from the Illinois Appellate Court holding which granted respondent a protected fourth amendment interest in a package that had been seized and searched during a lawful customs inspection and then delivered to him under controlled conditions.

SUMMARY OF ARGUMENT

Petitioner, the State of Illinois, respectfully submits that no warrant was required to reopen a package containing contraband that had been previously seized and examined during a lawful customs inspection and then delivered to respondent under controlled conditions. The respondent had no legitimate expectation of privacy in the contents of the package because any package shipped across the border is subject to being "searched at random." *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982). The package in the case at bar, was properly searched by a customs inspector as it crossed the border and was thereafter delivered to respondent at his apartment under controlled conditions by law enforcement officers. One officer then maintained surveillance in respondent's building. Approximately thirty to forty-five minutes later, after respondent pushed the package into the hallway of the building, the officer arrested respondent and reasserted control over the package.

The subsequent reopening of the package by law enforcement officials violated no right of respondent protected by the fourth amendment because respondent did not have a legitimate expectation of privacy in the package. Indeed, as recognized by the majority of courts to address this precise issue, the subsequent reopening of a package that has already been lawfully searched and then delivered under controlled conditions is merely the reassertion of control over the package, a reassertion that does not implicate the fourth amendment.

ARGUMENT

RESPONDENT HAD NO PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE CONTAINING CONTRABAND THAT HAD BEEN SEIZED AND EXAMINED DURING A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO RESPONDENT BY LAW ENFORCEMENT AGENTS UNDER CONTROLLED CONDITIONS, AND THEN RETAKEN BY THEM FROM RESPONDENT AFTER HE MOVED THE PACKAGE FROM INSIDE HIS APARTMENT INTO THE HALLWAY OF HIS APARTMENT BUILDING.

The respondent consignee of a package containing contraband that had been previously seized and examined during a lawful customs inspection and then delivered to respondent under controlled conditions has no legitimate expectation of privacy in that package. As recognized by the majority of courts to address this precise issue, because the recipient has no rights in the package which were protected by the fourth amendment no warrant is required to justify the subsequent retaking and reopening of the package. Indeed, the subsequent retaking and reopening of the package by law enforcement officials after the controlled delivery is merely the reassertion of actual physical control over the package.

During the course of a lawful customs inspection at the Lufthansa port of entry cargo facility at O'Hare Airport, Chicago, Illinois, Customs Inspector Ronald Drozek discovered an attempt to smuggle into the United States marijuana with a street value of $100,000.00. The marijuana had been secreted within a table top and the table top enclosed in a package. The package was shipped from Calcutta, India, and consigned to respondent at 61 East Goethe Street, Chicago, Illinois. After discovering

the marijuana, Inspector Drozek resealed the package and arranged for it to be delivered under controlled conditions to respondent at his apartment. Thirty to forty-five minutes after receiving the package and taking it into his apartment, respondent was arrested when he pushed the package into the hallway of his apartment building and the package was retaken by the law enforcement agents who had maintained surveillance in the building. The package was then transported to Chicago Police Headquarters, reopened, and the smuggled marijuana inventoried.

Prior to trial, respondent moved to suppress the evidence as having been seized in violation of his fourth amendment rights because no search warrant had been secured. Petitioner asserted that no warrant was required to justify the reopening of the package because the package had been properly searched and contraband discovered during a lawful customs border inspection and then delivered to respondent under controlled conditions. The trial court however, erroneously believing that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), somehow affected the issue of the retaking of the package by law enforcement agents following a lawful customs search and subsequent controlled delivery, held that a warrant was required to retake the package and suppressed the seized marijuana. On appeal, the Illinois Appellate Court, rejecting the contrary determination of the majority of courts to reach this issue, believed that respondent had a legitimate expectation of privacy in the package, an expectation that somehow developed immediately after the controlled delivery of the package to respondent. The Appellate Court concluded that the warrantless reopening of the package therefore violated respondent's fourth amendment rights. The holding of

the Illinois Appellate Court is not only patently erroneous, but elevates the fourth amendment to a position far beyond its spirit, intent, or purpose.

As this Court has long held, the fourth amendment protects only those areas in which a person has a legitimate expectation of privacy, not those areas in which he holds a mere subjective belief that no one will enter. *Katz v. United States*, 389 U.S. 347 (1967); *Rakas v. Illinois*, 439 U.S. 128 (1978). Indeed, this Court has recognized that an individual must establish a legitimate expectation of privacy in the area searched as a constitutional prerequisite to establishing a fourth amendment violation. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Further, regarding items sent through the mails, when the consignor of a package has "reason to assume that it would be opened before it arrives at its destination," he can have no expectation of privacy in the package which will be recognized as legitimate for purposes of the fourth amendment. *Walter v. United States*, 447 U.S. 649, n.12 (1980). Thus, while a person may believe that he has found the perfect hiding place, he can have no reasonable or protected expectation that he or his possessions will not be discovered if others have the right to inspect the contents of the package.

In the case of a package shipped across the border, this Court has long recognized the right of customs officials to inspect the contents of the package without probable cause and without a warrant. *United States v. Ramsey*, 431 U.S. 606 (1977). Indeed, searches made at the border, "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and items crossing into this country," are reasonable within the meaning of the fourth amendment simply by virtue of the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606, 616

(1977). The conclusion that any package shipped across the border may be lawfully searched and seized without infringing on any fourth amendment interest of the recipient has been reasserted in a long line of cases from this Court.[1] It appears that the premise for the conclusion that any package transported across the border is properly subject to search and seizure "at random by a customs officer," is simply that neither the consignor nor the consignee can have any legitimate expectation of privacy in a package entering the United States from across international borders.

Almost a century ago, in *Boyd v. United States*, 116 U.S. 616 (1886), this Court observed:

> As the act [of July 31, 1789, 1 Stat. 29, 43] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches of this kind [border searches] as "unreasonable," and they are not embraced within the prohibition of the [fourth] amendment. 116 U.S. at 623.

The principle that border searches are not subject to the warrant provisions of the fourth amendment and are "reasonable" within the meaning of that amendment has been emphatically reaffirmed by this Court. In *Carroll v. United States*, 267 U.S. 132 (1925), after noting that "[T]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable," 267 U.S.

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[1] This sovereign right was recognized by the First Congress, Act of July 31, 1789, ch. 5, 1 Stat. 29 (1789), and statutes exempting border searches from probable cause and warrant requirements have been in force in this country ever since. *See Barnett*, A Report on Search and Seizure at the Border, 1 Am. Crim. L. Q. 36 (1963); 3 LaFave, Search and Seizure: A Treatise on the Fourth Amendment 276 (1978).

at 147, this Court recognized the fundamental distinction between searches within this country, requiring probable cause, and border searches:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may lawfully be brought in. 267 U.S. at 153-154.

More recently, in *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971), this Court reiterated this long-standing history and noted the policy behind this exception to the fourth amendment:

> But a port of entry is not a traveler's home. His right to be left alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. 402 U.S. at 376.

Later, in *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973), this Court noted the constitutional distinction between searches occurring at national borders and searches governed by the fourth amendment:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '[t]o regulate commerce with foreign Nations.' Art. I, sec. 8,

> cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. 413 U.S. at 125.

Then, in *United States v. Ramsey*, 431 U.S. 606 (1977), this Court traced the history of border searches and emphatically concluded that border searches, from before the adoption of the fourth amendment, have been considered "reasonable" by the single fact that the person or item in question had entered into our country from outside. This Court noted that this "long-standing recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the fourth amendment itself." 431 U.S. at 619.

And, only last term, this Court reaffirmed its firm adherence to this long-standing exception to the fourth amendment, stating:

> The luggage carried by a traveler entering the country may be searched at random by a customs officer, the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982).

In short, this Court has unwaveringly held that border searches, grounded in the long-standing right of the sovereign to protect itself, are reasonable within the meaning of the fourth amendment simply by virtue of the fact that they occur at the border. Thus, although not every package crossing the border is searched, any package may properly and lawfully be searched by customs officials in order to exclude illegal items from entering this country. Therefore, because any package shipped across the border "may be searched at random by a customs officer," *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982), any expectation the recip-

ient might have that the contents of the package will not be discovered is unreasonable.

In the case at bar, respondent could have had no legitimate expectation of privacy in the contents of the package. He packaged the contraband inside a table top and shipped it through the international mail from Calcutta, India, to his apartment in Chicago, Illinois. (Tr. 30) The package was thus subject to being opened by customs officials at the border. In fact, the package was properly searched by a customs inspector as it crossed the border and the contraband was discovered. Any expectation that respondent might have had that the contraband was hidden in a private place was certainly unreasonable. Indeed, the majority of courts to address the issue have held that the recipient of a package that has been shipped across the border has no legitimate expectation of privacy in the contents of the package because the package is subject to inspection "at random" at the border. *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982).

Moreover, apart from recognizing the legitimacy of the customs search and the resultant discovery of contraband, these courts have recognized that law enforcement officials are entitled to deliver the package containing contraband under controlled conditions, to the intended recipient in an attempt to apprehend those involved. Indeed, this Court has observed that "[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

The rationale underlying the use of controlled deliveries is clear. If law enforcement officials come into possession of contraband that is in transit, they can, of course, legally seize the contraband and thereby frustrate its distribution. However, this leaves the parties involved free to try again. Thus, in the justifiable attempt to apprehend others involved in the criminal scheme, law enforcement officials send the contraband to the designated consignee in order to gather further facts and establish probable cause to arrest other participants in the criminal scheme. *See McConnell v. State*, 595 P.2d 147, 154, n.20 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979) (Alaska 1979).

The facts of *United States v. Ramsey*, 431 U.S. 606 (1977), a controlled delivery case, underscore the utility of controlled deliveries as an effective law enforcement technique. In *Ramsey*, customs officials discovered heroin being smuggled into the United States in envelopes mailed from Thailand. They contacted DEA agents who resealed the envelopes and delivered them under "surveillance". Co-defendant Kelly then collected the envelopes and met with the defendant. The DEA agents then arrested the defendant and his co-defendant and seized the envelopes. The controlled delivery of the contraband thus allowed law enforcement officials to ferret out the defendant's and co-defendant's participation in the "heroin-by-mail enterprise."

Courts which have addressed the issue of a controlled delivery, followed by a subsequent warrantless reopening of the package that had been lawfully searched during a customs border inspection, have held that the consignee has no right protected by the fourth amendment. *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981) (con-

curring opinion). As these courts have recognized, the subsequent reopening of the package is not a search at all but merely the reassertion of control over the package and its contents, an act which does not implicate the fourth amendment.

The idea that the recipient of a package has no fourth amendment interest in a package that has been subjected to a lawful customs search and then delivered to the recipient under controlled conditions was recently set forth in *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981). In *Billings*, a customs inspector in New York searched two packages addressed to a post office box in Milwaukee, Wisconsin, and discovered contraband. The packages, containing the contraband, were resealed and delivered to the post office box in Milwaukee under controlled conditions. After allowing the defendant to pick up the packages, and thereby exercise dominion and control over the packages, law enforcement officials arrested him and reopened the packages without a warrant.

In upholding the warrantless reopening of the packages, the court in *Billings* initially determined that because the packages had been previously searched during a lawful customs inspection, the "events in New York and Milwaukee must be viewed as one transaction, with the validity of the arrest and search of the [packages] following arrest dependent upon the validity of the search by the customs agent in New York." 101 Wis.2d at 666. The court then observed that:

> The first search here was a border search. Warrantless searches of international mail have been held constitutionally unobjectionable where a customs agent has reasonable cause to suspect the mail contains contraband. Probable cause to search is not required. *United States v. Ramsey*, 431 U.S. 606, 611-13.

> . . . Th[is] search constituted a proper border search, with seizure taking place only after the [packages] were known to contain cocaine. 101 Wis.2d at 667-668.

The court then reasoned that because the packages had been previously searched during a lawful customs border inspection the defendant "never acquired a reasonable expectation of privacy in the [packages]." 101 Wis.2d at 668. The court therefore concluded that the warrantless reopening of the package after a lawful customs border search and controlled delivery did not violate the defendant's fourth amendment rights. *See: United States v. Richards*, 638 F.2d 765 (5th Cir. 1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982).

In *People v. Bannister*, 447 N.Y.S.2d 829 (1982), the New York Supreme Court upheld the warrantless reopening of a package under facts strikingly similar to those present in the case under discussion. In *Bannister*, customs officials at New York's Kennedy Airport inspected packages shipped from Nigeria and consigned to the defendant. They discovered marijuana secreted within the packages and contacted DEA agents who arranged for a controlled delivery of the packages to the defendant. After allowing the defendant to exercise dominion and control over the packages, the DEA agents placed him under arrest, seized the packages, and later reopened them without a warrant. In upholding the warrantless reopening, the court first noted that "[t]he . . . opening of the crates and inspection of the contents was a *bona fide* border search and that fact, in and of itself, rendered the search reasonable and valid under the Fourth Amendment without requiring a warrant." 447 N.Y.S.2d at 831. The court in *Bannister* then reviewed the applicable law and found that the intrusion into the van and the removal of the containers and their subse-

quent search was not an independent action requiring a warrant, but merely the continuation of the valid warrantless search and seizure effectuated by the customs agents. The court concluded "it does not serve the purpose of the Fourth Amendment in any way to create unnecessary stumbling blocks" to such law enforcement. 447 N.Y.S.2d at 832-833.

The principle that there is no fourth amendment interest in a package that has been subjected to a lawful customs search and controlled delivery has also been recognized in cases where the initial examination of the package was made by a private party. In *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973), an Emery air freight employee in Los Angeles opened a suitcase being shipped to the defendant in New York and discovered 15 bricks of marijuana. He notified Los Angeles narcotics agents who seized the marijuana in plain view and then arranged for a controlled delivery of the suitcase and contraband by New York DEA agents to the defendant in New York City. After allowing the defendant to take possession of the suitcase and place it in the trunk of his car, New York DEA agents arrested the defendant and seized the suitcase. The suitcase was later reopened without a warrant. The Second Circuit Court of Appeals in upholding the warrantless reopening of the suitcase, reasoned that the New York seizure and search was not separate and distinct from the California search because the agents and police in New York were not making an initial seizure, but rather were merely reasserting control over the suitcase which had already been lawfully seized for legal purposes and which was merely being used as bait. The court therefore concluded that no warrant was required to reopen the suitcase.

The rationale underlying the decision in *DeBerry* is clear. The recipient of a package that was the subject of a

lawful search and controlled delivery has no legitimate expectation of privacy in the package. Therefore, any subsequent retaking and reopening of the package following the controlled delivery is not a seizure or search within the meaning of the fourth amendment and therefore no warrant is required to justify the reopening of the package. As the Second Circuit recognized in *DeBerry*, the subsequent retaking and reopening of the package is merely the reassertion of control over evidence "already rightfully within the government's possession." *See McConnell v. State*, 595 P.2d 147, 154 n.20 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979).

In *McConnell v. State*, 595 P.2d 147 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979), the Alaska Supreme Court upheld the warrantless reopening of a package that had already been lawfully searched by a private party and then delivered to the defendant under controlled conditions. In making its decision, the court enumerated the circumstances necessary for a controlled delivery and subsequent warrantless reopening of the package. First, contraband must be placed in transit from one person to another. Second, the contraband must be initially discovered through lawful means, such as a search by a private person. Law enforcement officials must then come into lawful possession of the contraband and deliver the contraband to the consignee under reasonably continuous surveillance. The reasonably continuous surveillance must continue after the consignee claims the package. Finally, any substantial break in the chain of custody will vitiate the lawfulness of the search. 595 P.2d at 154-155. After enumerating these circumstances, the court concluded in *McConnell*, that

> Thus, . . . the boxes were validly seized and searched pursuant to the *DeBerry* reassertion of control doctrine. The subsequent seizure and opening of the boxes by Anchorage authorities did not constitute a

second, distinct search subject to the fourth amendment's warrant requirement. 595 P.2d at 155.

In each of these decisions, the Court, whether it was a Circuit Court of Appeals or a State Court, recognized that the recipient of a package that had been the subject of a lawful search and controlled delivery has no legitimate expectation of privacy in the package and that any subsequent seizure and search of the package is merely the reassertion of control over the package. These courts have therefore held that after a lawful search and the discovery of contraband the recipient has no rights in the package which are protected by the fourth amendment and therefore, no warrant is required to justify the subsequent retaking and reopening.[2]

Although recognizing the legitimacy of the initial search and the discovery of the marijuana by the customs inspector (Pet. Cert. 7a), the Illinois Appellate Court nevertheless held that respondent possessed a protected expectation of privacy in the package. Confusing the con-

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[2] *See: United States v. Monica*, 663 F.2d 1173 (2d Cir. 1981); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981) (concurring opinion); *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975); *People v. Adler*, 50 N.Y.2d 730, 409 N.E.2d 888 (1980); *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *State v. Pohle*, 166 N.J. Super. 504, 400 A.2d 109 (1979). *People v. Plantefaber*, 91 Mich. App. 764, 283 N.W.2d 847 (1979), rev'd on other grounds, 410 Mich. 594, 302 N.W.2d 557 (1981); *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978); *State v. Edwards*, 197 Neb. 354, 248 N.W.2d 175 (1977). But *see*, *People v. Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980) (warrant required to reopen package following lawful customs search and controlled delivery), *cert. granted*, judgment vacated and remanded *sub nom.*, *California v. Riegler*, 453 U.S. 919 (1981), following remand original judgment reinstated in *People v. Riegler*, 127 Cal. App. 3d 317, 179 Cal. Rptr. 530 (1981), *cert. pending*, ... U.S. ..... .

stitutional distinction between a subjective and a legitimate expectation of privacy, the Illinois Appellate Court believed that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 422 U.S. 753 (1979), required the suppression of the marijuana because no warrant had been secured prior to the reopening of the package. The Appellate Court mistook this Court's comment in *Sanders* that "[t]he mere reasonableness of a search assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment," 442 U.S. at 758, for a judicial command that a warrant is required anytime a package is seized, regardless of the surrounding circumstances.

Blindly equating the package in the instant case, which had previously been subjected to a lawful customs search and delivered under controlled conditions, to the double locked footlocker in *Chadwick* and the suitcase in *Sanders*, both of which had never been subjected to a prior lawful search or seizure, the Illinois Appellate Court believed that respondent had a legitimate expectation of privacy in the smuggled contraband that arose when DEA Agent Labek and Chicago Police Officer Lipsek allowed respondent to exercise dominion and control over the contraband, a necessary element of the offense of possession, for thirty to forty-five minutes before arresting him. This belief is patently erroneous.

Although *Chadwick* and *Sanders* did hold that a warrant was required before the packages involved there were opened, there is a difference of constitutional dimension between those searches and the one involved here. In both *Sanders* and *Chadwick* the respondents manifested an expectation that the contents of their respective packages would remain free from public examination. Neither Chadwick nor Sanders had sent his package through a customs checkpoint where it was sub-

ject to being "searched at random." *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982). In contrast, when the instant respondent arranged for the contraband to be sent to him through the international mail, he manifested a specific recognition that the package would be the object of a lawful customs inspection. And, this Court has certainly never so much as suggested that an individual has a constitutionally protected expectation of privacy in a package when, by his own actions, that person causes the contents of his package to be exposed to public examination. In fact, this Court could not have done so without rejecting express the determination in *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), that the fourth amendment protects only legitimate expectations of privacy.

What the Illinois Appellate Court in the case at bar failed to appreciate is that the prior lawful customs inspection of the package prevented the table top from being a mere package subject to the rules of *Chadwick* or *Sanders*. At the point of the lawful customs inspection, as this Court's recent holding in *Ross* demonstrates, respondent had no legitimate expectation of privacy in the package. Contrary to the Illinois Appellate Court's view, there was no expectation of privacy that was somehow created during the thirty to forty-five minute period the package was in respondent's apartment. When respondent pushed the package into the public hallway it was lawfully retaken by the agent maintaining surveillance.

The Appellate Court also confused the concepts of custody and possession. The two are distinct. Custody does not mean possession. Nor does custody require constant surveillance. Custody means the right to control. That right does not vanish the instant the item or person in custody leaves the custodian's hands or sight. Custody can be maintained without constant possession or surveillance. See *United States v. Edwards*, 415 U.S. 800 (1974).

In *United States v. Edwards, supra*, police arrested the defendant for breaking into a post office and placed him in a jail. The next morning, some ten hours later, police, acting without a warrant, removed the defendant's clothes and examined them for incriminating evidence. Evidence was found and used to convict the defendant. The United States Court of Appeals for the Sixth Circuit overturned the conviction on the ground that police should have obtained a warrant before removing the defendant's clothes and examining them. This Court reversed the Court of Appeals and reinstated the conviction, holding that no warrant was required.

This Court noted that police seized Edwards and his clothes when they arrested him. Even though the police permitted Edwards to keep his clothes overnight and even though there was no indication, or reason to believe, that Edwards and his clothes were under constant surveillance during that time, this Court then held that from the time of arrest on "the police had lawful custody of Edwards and necessarily of the clothing he wore." *Id.* at 806.

Because the clothes were already in lawful custody, they could be examined without a warrant. "When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered." *Id.* at 806. The movement and examination of evidence that police had already properly seized and kept in custody violated no legitimate expectation of privacy. This Court concluded,

> Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence these personal effects of the accused that

they already have in their lawful custody as the result of a lawful arrest. *Id.* at 806.

The underlying rationale of *Edwards* is that custody in the fourth amendment context, means the right to control and does not require constant possession or surveillance. That is why the police in *Edwards* were held to have retained custody over Edwards' clothes even though they let Edwards keep the clothes overnight and even though the police did not watch the clothes constantly. It was sufficient that the police retained the power to control the movement of Edwards' clothes and would not have let Edwards take them out of the building.

This is the same concept of custody used in other contexts. Title 18 U.S.C. sec. 549 makes it unlawful to remove goods in "customs custody." Courts have held for purposes of this statute, goods imported into the United States are in customs custody from the moment of their arrival in the United States until they have been inspected, found to be correctly invoiced and found to otherwise comply with the laws of the United States, regardless of whether the Customs Service has actual physical possession. See *United States v. Harold*, 588 F.2d 1136, 1142 (5th Cir. 1979); *Mungo v. United States*, 423 F.2d 1351, 1354 (4th Cir. 1970). See also *Harris v. Dennie*, 28 U.S. 292, 303-304 (1830) (Interpreting predecessor statute).

Similarly here, law enforcement agents retained the power to control the movement of the items seized at customs during the controlled delivery and would not let respondent take them out of the building. Law enforcement agents delivered the items to respondent in person. After respondent took possession of the items Agent Labek stood watch so that respondent could not leave the building with them. At the first opportunity when respondent fortuitously pushed the package into the hallway, Agent

Labek retook the items. Thus, law enforcement agents maintained custody over the previously seized items throughout the controlled delivery. Respondent's temporary possession of the items for 30 to 45 minutes during the controlled delivery was as irrelevant to the question of custody as was Edwards' possession of his clothes in the ten hours after his arrest. In neither case did the temporary gap in government possession of the seized items terminate government custody of the seized items. Hence, in the instant case, as in *Edwards*, no warrant was required to remove and examine the previously seized evidence following the temporary break in government possession.

This is the conclusion reached by almost every court that has considered whether police need a warrant to retrieve evidence following a controlled delivery. The leading case is *United States v. DeBerry, supra*, 487 F.2d 448 (2d Cir. 1973). The United States Court of Appeals for the Second Circuit, held that the police did not need a warrant to retake and reopen the suitcase containing marijuana where the marijuana had first been discovered by a private party who told government agents, who then made a controlled delivery to the recipient. The Court reasoned that throughout the controlled delivery the suitcase and its contents "remained legally 'seized' just as much as if it were under the actual physical control of the police." *Id.* at 451. Therefore, when the police retook the bag "they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait." *Id.* at 451. The same analysis applies here and the same conclusion follows.

The *DeBerry* approach is reinforced by practical considerations that the Illinois Appellate Court ignored. The Appellate Court's insistence upon constant possession or

surveillance unreasonably impedes legitimate police investigation.

The fact that the package in the instant case was in the respondent's apartment for thirty to forty-five minutes did not affect the agent's ability to retake the package without a warrant. This Court has simply never required law enforcement officers to maintain constant exclusive physical possession or surveillance over an object in order to later search that object without a warrant. Indeed, this Court has recognized that exclusive physical possession or surveillance, if not impossible, is oft times difficult to maintain and often serves no purpose. Thus, in *United States v. Edwards, supra*, 415 U.S. 800 (1976), although the arresting officers had probable cause to believe that articles of the defendant's clothing were themselves material evidence, they waited for approximately 10 hours before seizing the defendant's clothing without a warrant and holding it as evidence. There was no indication, or even any reason to believe, that the defendant or his clothing had been kept under surveillance during the 10 hour period the defendant was in custody. Indeed, the evidence, paint chips, could easily have been brushed off by the defendant. However, holding that no warrant was required to remove the defendant's clothing even though the clothing had not been in the officers' actual physical possession the entire 10 hour period, this Court noted that prior to the removal of the defendant's clothing, "the police had lawful custody of [Edwards] and necessarily of the clothing he wore." 415 U.S. at 806.

Similarly, in *Chambers v. Maroney*, 399 U.S. 42 (1970), this Court upheld the warrantless search of the defendant's car that had been left in the police station parking lot overnight before being searched in the morning. Again, there is no indication, nor any reason to believe

that the car was kept under constant surveillance. This Court upheld the warrantless search however, because it was the same car and because "[t]he probable-cause factor still obtained." *Id.* at 52. *Accord, Texas v. White*, 423 U.S. 67 (1973). The same material facts which support the conclusions in *Edwards* and *Chambers* obtain in the controlled delivery situation presented by this case. There is simply no question that the package Agent Labek observed in the hallway was the same package that he had delivered to respondent thirty to forty-five minutes before. (Tr. 32) Moreover, the probable cause factor quite clearly still obtained.[3]

Most recently in *Michigan v. Tyler*, 456 U.S. 499 (1978), this Court upheld the warrantless search of a crime scene even though there was a period of approximately four hours during which the crime scene was not under surveillance. In *Tyler*, fire officials extinguished a fire and began searching the premises for evidence of arson. They were forced to leave the scene however, because "visibility was severely hindered by darkness, steam and smoke." *Id.* at 511. They returned four to five hours later and resumed their search. The defendant moved to suppress the fruits of the search because the fire officials never obtained a warrant. This Court held that the initial search was reasonably incident to the lawful entry to put out the fire, and treated the second search as a continuation of the first despite the four hour period during

[3] The Illinois Appellate Court suggested that because of the thirty to forty-five minute interval, the law enforcement officials were not absolutely certain that the package contained contraband. Law enforcement officers however, were not absolutely certain they would discover incriminating evidence in *Edwards* or *Chambers*. The rule, however, is that "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 804 (1971).

which law enforcement officials were not present at the site of the arson. This Court reasoned:

> Little purpose would have been served by [the fire officials] remaining in the building except to remove any doubt about the legality of the warrantless search and seizure later that same morning. Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the result, seizure of evidence. *Id.* at 511.

In the case at bar, as in *Edwards*, *Chambers*, and *Tyler*, the respondent did not acquire a legitimate expectation of privacy in the package during the thirty to forty-five minute interval that the package was in the respondent's apartment. In fact, by allowing the respondent to take the package into his apartment, Agent Labek and Officer Lipsek were acting reasonably, indeed, even commendably. First, because dominion and control is a necessary element of the offense of possession, the law enforcement officials allowed respondent to exercise a requisite amount of control over the package. This was accomplished by allowing him to pull the package into his apartment.

Further, in an attempt to comply with the law, Officer Lipsek left to obtain a warrant once it became apparent that respondent was going to take the package into the apartment. This Court has long held that one of the major goals of the fourth amendment is to prevent warrantless intrusions into private homes. It would be anomalous to interpret the fourth amendment to penalize the law enforcement officials in this case because they refrained from entering into respondent's home without a warrant. Agent Labek acted commendably when he waited for thirty to forty-five minutes for Officer Lipsek to return with a warrant. The fact that respondent fortuitously left the apartment with the package containing contraband in an apparent attempt to start distribution before Of-

ficer Lipsek could return with a warrant hardly renders the agent's retaking of the package improper. The agent's forbearance was necessary and reasonably incident to the controlled delivery and did not create a legitimate expectation of privacy in a package where none was before.

Moreover, if law enforcement officials were required to retake the package at the moment of delivery, as the Illinois Appellate Court suggests, they would not be able to ferret out possible confederates of the consignee. *See, United States v. Ramsey, supra,* 431 U.S. 606 (1977). Further, if Agent Labek and Officer Lipsek had retaken the package at the moment of delivery, a myriad of difficulties in proving necessary possession on respondent's part would have arisen at trial if respondent had simply denied any knowledge of the marijuana secreted within the table top. Additionally, implicit in the holding of the Illinois Appellate Court is the requirement that Agent Labek and Officer Lipsek perform the impossible under the facts of this case, facts which are not unique. The holding of the Illinois Appellate Court requires law enforcement officers to maintain actual eye contact with the package rather than surveillance of the apartment and knowledge that the package over which they reasserted control is the same package that was delivered. This holding penalizes law enforcement officers who attempt to apprehend others involved in the criminal enterprise. Moreover, it is extremely dangerous for law enforcement officials to enter or break into a private home to make a narcotics arrest, and in fact without consent or exigent circumstances would be illegal. The possibility of violence also makes such a procedure perilous. In the case at bar, respondent was intimately involved in a criminal narcotics enterprise as demonstrated by the fact that he was the recipient of contraband which filled a table that was 3 feet in diameter and 10 inches thick, contraband which had a street value of $100,000.00. It is clear that the

actions of the law enforcement officials were eminently reasonable and the officers at all times acted in the good faith execution of their duties.

There are thus, no technical or doctrinal reasons why the thirty to forty-five minute interval transformed the previously searched package into a *Chadwick* or *Sanders* package. Rather, as noted by the Seventh Circuit Court of Appeals in distinguishing between a *Sanders* search and a controlled delivery reassertion of control:

> Even as "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971) . . . we do not believe that the Supreme Court in *Sanders*, in which it recognized that 'the circumstances giving rise to suppression requests can vary almost infinitely,' intended that the word 'luggage' would automatically require suppression to the exclusion of all other prior testimony surrounding the application of the Fourth Amendment. *Sanders*, *supra*, 442 U.S. at 757. *United States v. Bulgier*, 618 F.2d 472, 476 (7th Cir. 1980).

In summary, petitioner respectfully submits that no warrant was required to justify the reopening of a package which had been sent through customs. Respondent had no legitimate expectation of privacy in the package because it was the subject of a lawful customs inspection, which could properly be conducted at random, and a subsequent controlled delivery. Rather, as properly recognized by the majority of courts, the retaking and reopening of the package was merely the reassertion of control over a package in which respondent had never had any legitimate expectation of privacy. Therefore, since respondent had no rights in the package which are protected by the fourth amendment, no warrant was required to justify the retaking and reopening of the package.

CONCLUSION

For all the foregoing stated reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County for further proceedings.

Respectfully submitted,

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